TM FEROZE KHAN & ORS

v.

MEERA HUSSAIN TM MOHAMED MYDIN

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
ABDUL MALEK AHMAD JCA
DENIS ONG JCA
[CIVIL APPEAL NO: P-02-372-96]
2 OCTOBER 1997

CIVIL PROCEDURE: *Striking out - Want of prosecution - Failure to take out summons for directions after close of pleadings - Long and deliberate delay - Whether default contumelious - Whether respondent prejudiced - Whether striking out of writ justified - Rules of the High Court 1980, O. 25 r. 1(1)(b)*

The appellants and the respondent in this case are children of one Mohamed Mydin Merican, deceased. In 1968, the deceased had transferred a parcel of land as a gift to the respondent, and had also created a trust deed in his favour. The appellants sought to challenge the gift, and on 15 January 1993 they filed a writ of summons against the respondent claiming for various declaratory judgments. This apart, the appellants had also obtained an injunction restraining the respondent from disposing of the said land. Having obtained the injunction, however, the appellants did not proceed further. The facts showed that, since the close of pleadings on 22 June 1995, no summons for directions was taken out by the appellants to put the action for trial. On 8 March 1996, the respondent's solicitors reminded the appellants to take out the summons for direction, but instead of acceding thereto, the appellants made an application for the originating summons to be heard together with their action. On 30 March 1996 the respondent filed a summons in chambers wherefore he applied to strike out the appellants' action. The learned Judge, exercising his discretion, struck out the writ whereupon the appellants appealed.

Held:
Per Shaik Daud Ismail JCA

[1] The decision whether to grant or refuse an application to strike out an action for want of prosecution is solely the discretion of the trial Judge. An appellate court can review the discretion if it is satisfied that the judge was wrong, but there is a presumption that the judge has rightly exercised his discretion, and the appellate court, therefore, would not readily interfere with such exercise of discretion.

[1a] The guiding principle is that the plaintiff's action is liable to be dismissed for want of prosecution when the court is satisfied that (i) the plaintiff's default has been intentional and contumelious; or (ii) the plaintiff or his lawyer is guilty of such inordinate or inexcusable delay that the defendants has been prejudiced by it.

[2] There was in this case already considerable delay, even before the issue of writ, of about twenty four years, that is after the registration of the transfer in favour of the respondent. Then there was a further delay of nine months after the issue of the writ. The appellants had not acted even after the remainder letter of 8 March 1996 and this failure is contumelious.

[3] The long and deliberate delay has no doubt prejudiced the respondent. There is much prejudice to a defendant in having an action hanging over his head indefinitely, not knowing when it is going to be brought to trial. Added to this is the fact that the appellants, after having obtained the injunction and caveated the property, appeared to be satisfied not to proceed to trial. An inference could thus be made that the primary purpose of filing the writ was only to obtain the injunction.

[4] There was no *bona fide* reason for not applying for summons for directions. In exercising his discretion, the learned Judge has also taken all relevant matters into consideration and was therefore justified to strike out the action.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

PROSEDUR SIVIL: *Pembatalan - Ketiadaan pendakwaan - Gagal mengeluarkan saman untuk arahan selepas pliding ditutup - Kelengahan yang panjang dan disengajakan - Samada bersifat menghina - Samada responden diprejudis - Samada pembatalan writ wajar - Kaedah-kaedah Mahkamah Tinggi 1980, A. 25 k. 1(1)(b)*

Perayu dan responden dalam kes ini adalah anak-anak kepada seorang Mohamed Mydin Merican, si mati. Pada tahun 1968, si mati telah menyerah milik se bidang tanah kepada responden sebagai satu pemberian, dan telah memeterai satu surat ikatan amanah baginya. Perayu berhajat untuk mencabar pemberian tersebut, dan pada 15 Januari 1993 mereka telah memfailkan writ saman dan memohon beberapa perintah perisytiharan terhadap responden. Selain itu, perayu juga telah memperolehi satu injunksi menghalang responden dari melupuskan tanah tersebut. Walaubagaimana pun, selepas mendapat injunksi berkenaan, perayu gagal bertindak dengan lebih lanjut. Fakta

menunjukkan bahawa, sejak pliding ditutup pada 22 Jun 1995, tiada saman untuk arahan diambil oleh perayu untuk meletakkan kesnya itu untuk perbicaraan. Pada 8 Mac 1996, peguamcara responden telah mengingatkan perayu supaya mengambil saman untuk arahan, tetapi perayu bukan sahaja tidak mengendahkannya, tetapi telah sebaliknya memohon supaya saman pemula didengar beserta dengan tindakan mereka. Pada 30 Mac 1996 responden telah memfailkan saman dalam kamar di mana mereka memohon untuk membatalkan tindakan writ perayu. Hakim yang bijaksana, dalam melaksanakan budibicaranya, membatalkan writ tersebut dan perayu telah merayu.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Keputusan samada untuk membenarkan atau pun menolak sesuatu permohonan untuk membatalkan tindakan kerana ketiadaan pendakwaan adalah sepenuhnya perkara budibicara hakim perbicaraan. Mahkamah Rayuan boleh mengkaji semula budibicara berkenaan jika ianya berpuashati bahawa hakim tersebut salah, namun terdapat andaian bahawa hakim tersebut adalah betul dalam melaksanakan budibicaranya, dan mahkamah rayuan, oleh yang demikian, tidak akan terburu-buru untuk mencampuri urusan pelaksanaan budibicara sedemikian.

[1a] Prinsip yang harus dipakai ialah tindakan plaintif adalah terbuka untuk ditolak atas alasan ketiadaan pendakwaan jika mahkamah berpuashati bahawa (i) salahlaku plaintif adalah disengajakan dan bersifat menghina; atau (ii) plaintif atau peguamnya telah melakukan kelengahan yang melampau dan tidak boleh dimaafkan sehingga memprejudiskan defendan.

[2] Sejak sebelum writ dikemukakan lagi, sudah terdapat kelengahan yang sangat dalam kes ini, selama lebih kurang dua puluh empat tahun, iaitu selepas pendaftaran pindahmilik pemberian tersebut kepada responden. Selanjutnya, terdapat kelengahan selama sembilan bulan selepas writ dikeluarkan. Perayu tidak berbuat apa-apa walaupun setelah ingatan diberi melalui surat bertarikh 8 Mac 1996 dan kegagalan ini adalah bersifat menghina.

[3] Kelengahan yang panjang dan disengajakan jelas telah memprejudiskan responden. Terdapat prejudis yang berat terhadap responden kerana berhadapan dengan tindakan yang tergantung di atas kepalanya, tanpa mengetahui bilakah ianya akan dibawa untuk perbicaraan. Tambahan pula perayu, selepas memperolehi injunksi dan selepas mengkaveat hartanah tersebut, nampak berpuashati untuk tidak meneruskan kepada perbicaraan.

Suatu andaian dengan itu boleh dibuat bahawa tujuan utama memfailkan writ hanyalah untuk mendapatkan injunksi.

[4] Tiada alasan *bona fide* untuk tidak memohon saman untuk arahan. Dalam melaksanakan budibicaranya, hakim yang bjaksana telah mengambilkira semua faktor yang relevan dan oleh itu tindakannya membatalkan writ adalah wajar.

[Rayuan ditolak.]

Cases referred to:
Vasudevan v. T Damodavan & Anor [1981] 2 MLJ 150 ***(refd)***
Toh Hock Thye & Ors v. Toh Chwee Biow [1982] 1 MLJ 152 ***(refd)***
Ratnam v. Cumarasamy & Anor [1965] 31 MLJ 228 ***(refd)***
Lim Heng Hoo v. Tan Hock Hai & Ors [1974] 1 MLJ 101 ***(refd)***
Hong Kong Bank (M) Bhd v. Raja Letchumi a/p Ramarajoo [1996] 4 CLJ 155 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 25 r. 1(1)(b), (4)

[Appeal from High Court Malaya, Pulau Pinang; Code No: 22-19-1993]

For the appellants - Hamid Sultan Abu Backer; M/s Hamid Sultan & Rakan-rakan
For the respondent - Abu Haniffa Md Abdullah; Sykt Abu Haniffa

JUDGMENT

Shaik Daud Ismail JCA:

This is an appeal from the decision of the Penang High Court which had on 30 May 1996 dismissed the appellants' writ of summons and statement of claim for want of prosecution on the ground that the appellants had not set down the matter for trial pursuant to O. 25 r. 1(1)(b) of the Rules of the High Court 1980 within one month from the close of pleadings.

The four appellants, of whom three are outside the jurisdiction of the court, filed a writ of summons and statement of claim on 15 January 1993 for various declaratory judgments against the respondent. The facts leading to the filing of the writ are that the appellants and respondent are children of one Mohamed Mydin Merican, now deceased, having died on 12 October 1991. The deceased was the legal owner of a parcel of land known as Lot 465, Sek. 11-W Daerah Timur Laut, Georgetown Pulau Pinang with nine houses erected thereon. On or about 2 February 1968 the said Mohamed Mydin Merican, during his lifetime, transferred the said property as a gift to the respondent, who was then eight years old. At the same time the deceased created a trust deed declaring a trust in favour of the respondent. Upon the death of the deceased,

the respondent applied by an originating summons for a vesting order of the said property on himself. The appellants through their solicitors filed the said writ, and also obtained an injunction restraining the respondent from disposing of the said property. The grounds relied upon by the appellants are that they are beneficiaries of the said estate of the deceased, and that the said property fails as a gift under Islamic Law and therefore the appellants are entitled to a share in the said property and that an injunction is necessary to maintain the *status quo.*

The respondent filed a summons in chambers on 31 March 1993 for an order that the injunction granted on 16 January 1993 be set aside which application was dismissed. The respondent then filed their statement of defence on 14 April 1994 and thereafter on 21 April 1994 an amended statement of defence.

Pursuant to O. 25 r. 1(1)(b) of the Rules of the High Court 1980, in all actions begun by writ, the plaintiff must, within one month after the pleadings in the action are deemed to be closed, take out a summons for directions, failing which sub-r. (4) provides that the defendant may do so or may apply for an order to dismiss the action. The record of appeal shows that on the application of the respondent, the court had on 22 June 1995 admitted the statement of defence and the amended statement of defence which were filed on 14 April 1994 and 21 April 1994 respectively. Therefore for all intents and purposes the pleadings were deemed to have been closed on 22 June 1995. The summons for directions should, therefore, have been taken out by the appellant on or before 21 July 1995. It is not disputed that the appellants failed to do so. Nine months thereafter, on 8 March 1996, the respondent's solicitors wrote to the appellants' solicitors requesting them to take out the summons for directions within seven days failing which the respondent's solicitors would apply for the action to be struck out for want of prosecution. Having been so reminded, the appellants again failed to do so. Instead of acceding to the request, the appellants made an application by summons in chambers for an originating summons No. 24-553-92 to be heard together with their action. On 30 March 1996 the respondent filed this summons in chambers to strike out the appellants' action.

Whether to grant or refuse an application to strike out an action for want of prosecution, is solely the discretion of the trial judge. It is a well-settled principle that an appellate court should not readily interfere with such an exercise of discretion. The Federal Court in *Vasudevan v. T. Damodavan & Anor.* [1981] 2 MLJ 150 stated that it will not interfere with the exercise of discretion of a trial judge in an application to have the action dismissed for want of prosecution. An appellate court can review questions of discretion if

it is clearly satisfied that the judge was wrong but there is a presumption that the judge has rightly exercised his discretion and the appellate court should not readily interfere. This statement of law was accepted by another Federal Court case of *Toh Hock Thye & Ors. v. Toh Chwee Biow* [1982] 1 MLJ 152, also a case of striking out an action for want of prosecution. (See also the Privy Council decision in *Ratnam v. Cumarasamy & Anor.* [1965] 31 MLJ 228). In *Lim Heng Hoo v. Tan Hock Hai & Ors.* [1974] 1 MLJ 101, the plaintiff therein failed to take out summons for direction seven months after the pleadings had closed and the defendant applied for the action to be struck out for want of prosecution. The trial court allowed the application and the appeal to the Federal Court was dismissed. In *Toh Hock Chye & Ors. v. Toh Chwee Biow (supra)* the Federal Court laid down the law applicable to this particular issue as follows:

> ... We propose for the purpose of this appeal to state the principle which would guide us in deciding this appeal to be thus – that the plaintiff's action is liable to be dismissed for want of prosecution when the court is satisfied that:
>
> (1) the plaintiff's default has been intentional and contumelious or,
>
> (2) the plaintiff or his lawyer is guilty of such inordinate or inexcusable delay that the defendant has been prejudiced by it;

In the present case, the learned judge exercised his discretion after taking into consideration all relevant matters especially the history of the action. It must also be remembered that there was already a considerable delay, even before the issue of the writ, of about twenty four years, that is after the registration of the transfer in favour of the respondent. Then, there was a further delay of nine months after the issue of the writ. The respondent kindly gave the appellants another opportunity to remedy their default by sending the reminder letter of 8 March 1996 and yet they failed to comply. This failure, in our view, is contumelious.

There is, therefore, no doubt there was this long delay, and a deliberate one at that. It only remains for consideration whether such delay has prejudiced the respondent. In our view, it undoubtedly has. There is much prejudice to a defendant in having an action hanging over his head indefinitely, not knowing when it is going to be brought to trial (see *Hong Kong Bank (M) Bhd. v. Raja Letchumi a/p Ramarajoo* [1996] 4 CLJ 155). Added to this is the fact that the appellants had obtained an injunction restraining the respondent from dealing with his own property and had also caveated the property. Having obtained the injunction and caveated the property, the appellants appear to be satisfied not to proceed to trial. From this, it can be inferred that the primary purpose of filing the writ appear to be a vehicle to obtain the injunction.

The reason given for the delay was that the appellants were waiting for their application for consolidation of the present action with an earlier matter to be approved by the court. We find this reason to be a lame excuse as in the summons for directions itself, the appellants could also apply for consolidation. Therefore, we find that there was no *bona fide* reason for not applying for summons for directions.

After considering the history of the case, as did the learned judge, we are of the view that the learned judge was justified in exercising his discretion to strike out the action. For ourselves, we cannot find any reason to interfere with the exercise of that discretion. We dismissed the appeal with costs and ordered the deposit to go to the respondent to account of costs.

Reported by WA Sharif